

1986

Bruce G. Parry and Mansour, Inc. v. Okada
Hardware Company, LTD., a foreign corporation,
and Hirota Tekko, K.K., a foreign corporation :
Reply Brief

Utah Supreme Court

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Gary D. Stott; Robert G. Gilchrist; Richards, Brandt, Miller and Nelson; Attorneys for Appellant Mansour; Daniel Darger; Attorney for Appellant Parry; Mary Ellen Sloan; Attorney for Appellant Parry.

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE G. PARRY and MANSOUR,	:	
INC.,	:	
Appellants,	:	
	:	
vs.	:	Case No. 86 0278
	:	
OKADA HARDWARE COMPANY, LTD.,	:	
a foreign corporation, and	:	"Category No. 10"
HIROTA TEKKO, K.K., a foreign	:	
corporation,	:	
	:	
Respondents.	:	

APPELLANTS' REPLY BRIEF

Appeal from Order of the
Second Judicial District Court of Davis County
Honorable Rodney S. Page, Judge

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ARGUMENT

POINT I

OKADA HARDWARE AND HIROTA TEKKO, K.K., HAVE
SUFFICIENT CONTACTS WITH THE STATE OF UTAH
TO ALLOW THE UTAH COURTS TO IMPOSE JURISDICTION
OVER THEM.

Respondents Okada Hardware and Hirota Tekko, K.K., have argued that they did not have sufficient contacts with the State of Utah to justify in personam jurisdiction over them in Utah. The facts on record reflect and support the opposite conclusion.

Okada Hardware and Hirota Tekko, K.K., discuss the eleven factual findings made by the Second District Court in its February 25, 1986, ruling that it did not have jurisdiction. Included in these facts was a finding that the maul in question was never advertised or sold in the State of Utah. This finding by the Court was clearly in error.

The record below establishes without dispute the fact that prior to and at the time of the accident, the maul was being advertised and sold in the State of Utah. Defendant Ernst Home Center submitted Answers to the plaintiffs' Interrogatories on July 11, 1984, which are attached as the second appendix to the appellants' brief and which are also attached here as an appendix for the Court's convenience. Answer No. 9 states that the maul was available for sale in all Ernst outlets in the State of Utah. This included the date of this accident. The appellants agree that the maul in question was purchased in Idaho and brought to Utah as a

Christmas present. However, the maul could have been purchased at any Ernst outlet in Utah and then been given to its owner, Mr. Thayne. Judge Page noted in his subsequent April ruling that the maul was available for sale in Utah.

Hirota Tekko, K.K. and Okada Hardware knew that their products would be distributed beyond the point of importation. Mansour does not contend that Okada or Hirota had a United States representatives. The Japanese instead dealt with Mansour knowing that Mansour would distribute and sell their products wherever possible. Therefore, the Japanese could and should have foreseen that their products would be sold and used in various states, including Utah. They placed no limitations upon these sales.

The "stream of commerce" theory does not have to be extended or misconstrued to find jurisdiction over the Japanese. That theory imposes jurisdiction over a manufacturer in any forum where the product is marketed when the manufacturer knowingly places its product in a market in such a way that it knows or should know that the product will be sold in the forum state. In this situation, that is exactly what occurred. The Japanese marketed their products, knowing or with the ability to know that the products would be sold in Utah. The products were widely sold in Utah. Therefore, the Utah courts have jurisdiction over the Japanese manufacturer and distributor for the alleged injuries the product caused in Utah.

The appellants do not seek to extend the stream of commerce theory into an "ocean of commerce" theory as argued by the Japanese. They do not seek a ruling that the Japanese would be subject to jurisdiction everywhere their product is used. Instead, the appellants seek a ruling that the Japanese will be responsible in this jurisdiction, Utah, where their products were widely advertised and sold.

The Japanese argument when extended would subject them only to jurisdiction in California. However, their products are sold elsewhere, including Utah. To force Utah citizens to go to California when injured in Utah by a Japanese product is an inequitable and unfair burden upon them. Therefore, this court should find jurisdiction over the Japanese in Utah.

POINT II

HIROTA WAIVED ITS JURISDICTION CLAIM THROUGH ITS PRO SE APPEARANCE.

Respondent Hirota Tekko, K.K., has argued that the letter its president sent to Mansour's counsel on August 26, 1985, does not constitute an answer. In support it cites the case of Fibreboard Paper Products Corp. v. Dietrich, 25 Utah 2d 65, 475 P.2d 1005 (1970). The Fibreboard case involved a letter that a defendant sent directly to a plaintiff. However, the issue on appeal was whether or not a summons had been issued on a timely basis. The Court held that since the summons was not issued in accordance with Rule 4(a) of the Utah Rules of Civil Procedure,

that the default judgment should be set aside. In addition, the letter discussed by the Court is distinguishable from the letter involved herein. In Fibreboard, the defendant had retained an attorney. Thus the plaintiffs had someone to contact after receiving the letter. In the case at hand, third-party plaintiff Mansour was dealing with a Japanese corporation which had been served through its consulate. There was no local counsel, nor even a local organization to contact after receiving the letter. Therefore, the situation was different from that in Fibreboard. Therefore, appellants assert that Hirota waived its rights to contest jurisdiction by submitting the pro se answer to Mansour's Third-Party Complaint.


CONCLUSION

The Japanese entities, Okada Hardware Company, Ltd. and Hirota Tekko, K.K., continually marketed a product that was distributed, advertised, and sold in Utah. They were thus doing business in Utah, and had sufficient minimum contacts to allow the Utah courts to find jurisdiction over them. In addition, Hirota Tekko waived its jurisdiction defense by submitting a pro se answer. Therefore, appellants Bruce G. Parry and Mansour, Inc., respectfully request that this Court reverse the District Court's dismissal of the Third-Party Complaints against Hirota Tekko, K.K. and Okada Hardware Company and allow this matter to move forward against them.

1986. RESPECTFULLY SUBMITTED this 22nd day of December,

RICHARDS, BRANDT, MILLER
& NELSON


ROBERT G. GILCHRIST
Attorneys for Appellant Mansour


DANIEL DARGER
Attorneys for Appellant Parry

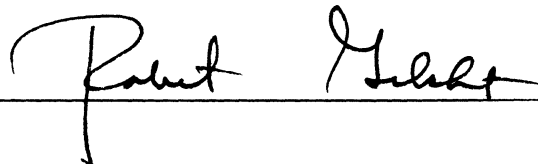
MAILING CERTIFICATE

I HEREBY CERTIFY that four true and correct copies of the foregoing instruments were mailed, first class, postage prepaid on this 22nd day of December, 1986, to the following counsel of record:

H. JAMES CLEGG
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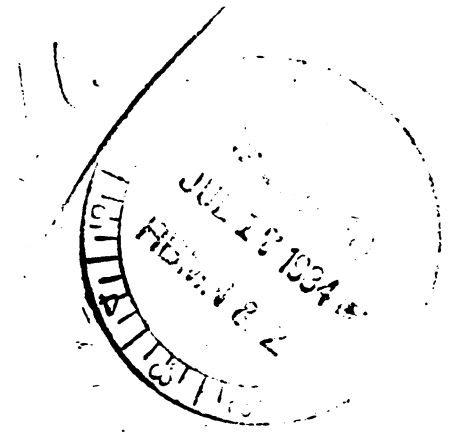
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Attorneys for Defendants and
Third Party Plaintiffs



IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

BRUCE G. PARRY,

Plaintiff,

vs.

ERNST HOME CENTER CORPORATION,
a Washington corporation; PAY
'N SAVE, a Washington corpora-
tion; ERNST HOME CENTER CORP.,
doing business in Idaho; TOM
McCLOSKEY; MONSOUR, INC., d/b/a
West Coast Mercantile Company
and also known as WECO; JOHN
DOE #1 a citizen or subject of
a foreign state; and JOHN DOE
#2, a citizen or subject of a
foreign state,

Defendants.

ERNST HOME CENTER CORPORATION,
a Washington corporation; PAY
'N SAVE, a Washington corpora-
tion; ERNST HOME CENTER CORP.,
doing business in Idaho,

Third-Party Plaintiffs,

ANSWERS TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES
TO ERNST HOME CENTER CORP.,
PAY 'N SAVE AND ERNST HOME
CENTER CORP. (Idaho)

Civil No. 33206

PACIFIC MARINE SCHWABACHER, a)
foreign corporation,)
Third-Party Defendant.)

Defendants Ernst Home Center Corporation, Pay 'N Save, and Ernst Home Center Corp. (hereinafter "Ernst") hereby answers plaintiff Bruce C. Parry's interrogatories as follows:

INTERROGATORY NO. 1: State the name, address & occupation of the person answering these interrogatories on behalf of the foregoing defendants.

ANSWER NO. 1: Dale L. Colbert
Former Ernst Tool buyer
5305 80th Street East
Tacoma, Washington 98011

Scott Grant
Director of Loss Prevention
1511 6th Avenue
Seattle, WA 98101

INTERROGATORY NO. 2: State the factual basis for your claim in the Third Defense that the accident and injuries were caused by misuse of the product by plaintiff.

ANSWER NO. 2: The photograph of the log splitter in question indicates a chip on the blunt end of the tool. Normal use of the log splitter involves striking wood with the sharp end of the tool. Using the tool as a sledge hammer to strike or drive hard materials is a misapplication, which the location of the chip on the blunt end of the log splitter indicates. Discovery is continuing, and further evidence of misuse may be discovered.

INTERROGATORY NO. 3: State the factual basis of your claim in the Fourth Defense that the plaintiff was guilty of negligence and assumption of the risk.

ANSWER NO. 3: Plaintiff may have struck a metal object with this "wood splitting maul." In addition, plaintiff failed to use elementary safety equipment such as protective eyewear. Discovery is continuing, and further evidence of negligence and assumption of the risk may be discovered.

INTERROGATORY NO. 4: State the factual basis of your claim in the Fifth Defense that the accident and injuries complained of were caused by the negligence of third parties.

ANSWER NO. 4: Ernst has not done sufficient discovery at this time to state what other parties were involved. Ernst will supplement this answer following the completion of discovery.

INTERROGATORY NO. 5: State whether the product was for sale or offered for sale at any time at the Ernst Home Center Corp. doing business in Twin Falls, Idaho (hereinafter "Ernst, Idaho").

ANSWER NO. 5: Yes.

INTERROGATORY NO. 6: If your answer to No. 5 is yes, state the dates that the product was available for sale at Ernst, Idaho.

ANSWER NO. 6: The product has been available for sale at Ernst in Idaho on an intermittent basis. Each store orders its own products and, therefore, Ernst is unable to determine the dates the product was available.

INTERROGATORY NO. 7: If there is more than one Ernst Home Center in Twin Falls, state the addresses of each store.

ANSWER NO. 7: There is only one Ernst Home Center in Twin Falls, Idaho.

INTERROGATORY NO. 8: Was the product available for sale in the State of Utah by Ernst and Pay 'N Save?

ANSWER NO. 8: The product was available for sale in the State of Utah by Ernst Home Center Corporation only.

INTERROGATORY NO. 9: If your answer to No. 8 is yes, state the dates that the product was available for sale and the locations that it was available for sale.



ANSWER NO. 9: The product was available for sale at all Ernst Home Center locations in Utah. Ernst is unable to determine the dates the product was available. See answer to Interrogatory 6.

INTERROGATORY NO. 10: What is the relationship between Ernst Home Center Corporation and Pay 'N Save; and between Ernst Home Center Corporation and Ernst Home Center, Idaho?

ANSWER NO. 10: Ernst Home Center Corporation and Ernst Home Center, Idaho are both divisions of Pay 'N Save Corporation of Washington.

INTERROGATORY NO. 11: From whom did Ernst and Pay 'N Save obtain the product for retail sale.

ANSWER NO. 11: On information and belief, Ernst obtained the product from Pacific Marine Schwabacher, now doing business as Pacific Marine.

INTERROGATORY NO. 12: Does Ernst and Pay 'N Save presently sell or offer for sale the product?

ANSWER NO. 12: Ernst does; Pay 'N Save does not.

INTERROGATORY NO. 13: If your answer to No. 12 is yes, state the names and addressees of each store in which it is offered for sale.

ANSWER NO. 13: The product is offered for sale in all Ernst Home Center locations.

INTERROGATORY NO. 14: Does Ernst and Pay 'N Save contend that it and all agents or employees of theirs had no knowledge whatsoever of any hazard, danger, defect or defective condition existing in the product and/or the subject product prior to the alleged occurrence?

ANSWER NO. 14: Ernst objects to this interrogatory on the grounds that it is vague and ambiguous. In the spirit of cooperation, however, and without waiving its objection, Ernst will say that the product, like all cutting and striking tools, has some inherent and obvious dangers and hazards. Ernst did not have knowledge of any defect or defective condition existing in the product.

INTERROGATORY NO. 15: If the answer to the preceding interrogatory is in the negative, please identify all hazards, dangers, defects, or defective conditions in the product and/or subject product of which Ernst's and Pay 'N Save, its agents, or its employees had knowledge prior to the alleged occurrence, stating for each such hazards, danger, defect or defective condition:

- a. How and from whom did Ernst and Pay 'N Save or its agent(s) or employee(s) gain such knowledge;
- b. the identity, by name, address and job title of the agent(s) or employee(s) of Ernst and Pay 'N Save who first acquired such knowledge;
- c. when such knowledge was acquired;
- d. a full description of the hazard, danger, defect or defective condition;

f. the action or actions, if any, Ernst and Pay 'N Save or any agent or employee of them took to warn of, repair or correct such defect or defective condition so as to safeguard the plaintiff or any user of the product.

g. the possible results of such hazard, danger, defect or defective condition which Ernst and Pay 'N Save foresaw.

ANSWER NO. 15: Not applicable.

INTERROGATORY NO. 16: Has Ernst and Pay 'N Save ever conducted any recall campaigns, operations, programs or activities which involved the product or similar products?

ANSWER NO. 16: Not to Ernst's knowledge.

INTERROGATORY NO. 17: If the answer to the preceding interrogatory is in the affirmative, please state and describe in complete detail each such recall campaign, operation, program or activity, including but not limited to such information as:

a. the exact date of the announcement or beginning of the campaign or operation;

b. the purpose of the campaign or operation, in terms of potential or real defects sought to be checked and/or corrected;

c. the types or model of products involved in the campaign or operation;

d. the number of products of each type referred to in sub-section (c) sought to be examined and/or corrected.

e. the number of products of each type actually examined and/or corrected.

ANSWER NO. 17: Not applicable.

INTERROGATORY NO. 18: Has Ernst and Pay 'N Save ever been cited, criticized, or reprimanded with respect to this product and state the name and address of the person who has custody of the records relating to same?

ANSWER NO. 18: Not to Ernst's knowledge.

INTERROGATORY NO. 19: Has there ever been any litigation initiated against Ernst and Pay 'N Save concerning the product, and alleged defect? If so, please:

- a. give the title and date of each such action;
- b. outline the contents of the complaint filed in each such action;
- c. state the name and address of the court involved;
- d. give the name and address of the attorney for the plaintiff in each such action.

ANSWER NO. 19: Not to Ernst's knowledge.

INTERROGATORY NO. 20: State if Ernst and Pay 'N Save has retained any expert with respect to this matter and state whether the expert has prepared a written report.

ANSWER NO. 20: Not at this time.

INTERROGATORY NO. 21: If the answer to the foregoing interrogatory is in the affirmative, state the name and address and professional title of said expert and state the substance of the facts that said expert is expected to testify to, the opinion held by said expert and which he will testify to, and the grounds of each opinion that said expert will testify to.

ANSWER NO. 21: Not applicable.

INTERROGATORY NO. 22: Does Ernst and Pay 'N Save, its attorneys, or agents, have any statements taken from any person concerning the

happening or event giving rise to this action, other than statements supplied by the plaintiff?

ANSWER NO. 22: Not at this time.

INTERROGATORY NO. 23: If the answer to the foregoing interrogatory is in the affirmative, state the name and last known address of each person from whom a statement was taken, the date when said statement was taken, who was present when the statement was given, whether such statement is in writing or has been reduced to writing, and who has possession or custody of the statement or a copy hereof.

ANSWER NO. 23: Not applicable.

INTERROGATORY NO. 24: Does Ernst and Pay 'N Save have any photographs of the product or the subject product?

ANSWER NO. 24: Not to Ernst's knowledge.

INTERROGATORY NO. 25: If your answer to No. 24 is yes, state the name and address of the person who has possession of said photographs.

ANSWER NO. 25: Not applicable.

INTERROGATORY NO. 26: Do you or did you manufacture the product described in plaintiff's complaint?

ANSWER NO. 26: No.

INTERROGATORY NO. 27: If not, state:

- a. the name and address of each manufacturer or supplier from whom you obtained this product;
- b. the tradename of the product;
- c. whether you prepared specifications concerning the size, design or other qualities of this product.

d. whether you obtained any written warranties concerning the product from your suppliers.

ANSWER NO. 27:

a. Okiedo is the manufacturer of this product. Its address, on information and belief, is P.O. Box 22, Meki, Hyogo-Pref, Japan. Cecil Mansour is the importer of this product. His address is: 5409 West Adams, Los Angeles, California 90016.

b. Weco maul.

c. No specifications were prepared.

d. No warranties were prepared.

INTERROGATORY NO. 28: State verbatim the written specification you submitted, or written warranties you received, concerning the qualities of the product.

ANSWER NO. 28: Not applicable.

INTERROGATORY NO. 29: Did or are you aware of anyone who performed any chemical and/or metallographic analysis of the product?

ANSWER NO. 29: Not known.

INTERROGATORY NO. 30: If so, state:

a. the name, address and job title of each person who was in charge of each test performed.

b. the date each test was conducted.

c. the method used to sample the material that was tested.

d. the size of the samples tested.

e. a description of procedure used to prepare the samples for testing.

f. the results of the chemical and/or metallographic analysis.

ANSWER NO. 30: Not applicable.

INTERROGATORY NO. 31: Describe in detail Ernst and Pay 'N Save's relationship to the product, either as manufacturer, assembler, importer, retailer, etc.

ANSWER NO. 31: Retailer.

INTERROGATORY NO. 32: State the length of time the product has been available for retail sale by Ernst and Pay 'N Save in the United States.

ANSWER NO. 32: Unknown.

INTERROGATORY NO. 33: Did Ernst and Pay 'N Save provide written warranties regarding the product?

ANSWER NO. 33: No.

INTERROGATORY NO. 34: If so, please state the warranty verbatim.

ANSWER NO. 34: Not applicable.

INTERROGATORY NO. 35: Did Ernst and Pay 'N Save inspect the product for defects in manufacture?

ANSWER NO. 35: No.

INTERROGATORY NO. 36: State the names, addresses, and occupations of any and all individuals known to Ernst and Pay 'N Save that would have knowledge of the manufacture, export, import, distribution, or of the retailing of the product.

ANSWER NO. 36: Present distributor: Jensen Byrd Co., 310 West Riverside Ave., Spokane, Wash. 99220; prior distributor: Pacific Marine Schwabacher; Importer: Cecil Mansour, 5409 West Adams, Los Angeles, CA 90016.

INTERROGATORY NO. 37: Are Ernst and Pay 'N Save incorporated in the State of Utah or authorized to do business in Utah?

ANSWER NO. 37: Ernst and Pay 'N Save are authorized to do business in Utah.

INTERROGATORY NO. 38: If your answer is yes, state the date of incorporation or when authorization was received and whether Ernst and Pay 'N Save continue to be incorporated or authorized to do business in Utah.

ANSWER NO. 38: December 28, 1983.

DATED this 25TH day of April, 1984.

Dale L. Colbert
Dale L. Colbert

STATE OF Washington ; ss.
COUNTY OF King ;

On the 25 day of May, 1984, personally appeared before me Dale L. Colbert, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same.

Reagan L. Prutkin
NOTARY PUBLIC - residing in:
King County

My Commission Expires:

3-21-85

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of ~~April~~ ^{July, 1984}, a true and correct copy of the foregoing Answers to Interrogatories was mailed, postage prepaid, to the following:

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Telephone: (801) 531-1777

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

BRUCE G. PARRY,	:	
Plaintiff,	:	
vs.	:	AFFIDAVIT OF CECIL MANSOUR
ERNST HOME CENTER CORPORATION,	:	
et. al.,	:	
Defendants.	:	
	:	
ERNST HOME CENTER, et. al.,	:	
Third-Party	:	
Plaintiffs	:	
vs.	:	
HIROTA TEKKO K.K., and OKADA	:	
HARDWARE CO., LTD.,	:	
Third-Party	:	Civil No. 33206
Defendants.	:	

STATE OF CALIFORNIA)
 : ss.
COUNTY OF Los Angeles)

Cecil Mansour, being first duly sworn, deposes
and states as follows:

1. That prior to and on January 3, 1981, he was
the president of Mansour, Inc., a named defendant herein. In
that capacity he has personal knowledge of the relationship
between Mansour and its Japanese suppliers and between
Mansour and its United States distribution system.

2. That third-party defendant Hirota Tekko
K.K., manufactures various products for exportation to the
United States, including the item that plaintiff alleges was
defective and caused his injury herein.

3. That third-party defendant, Okada
Hardward, Co., LTD. exports these products manufactured by
Hirota from Japan to Mansour in California, for sale and
distribution in the United States.

4. That third-party plaintiff Mansour, imports
these products for distribution and eventually for retail sale
in the United States.

5. That prior to and on January 3, 1981, third-
party plaintiff Mansour sold these products to it
distributor Pacific Marine Schwabacher, for wholesale
distribution throughout the western area of the United States.

6. That prior to and on January 3, 1981, Pacific
Marine Schwabacher sold these products to various retailers

located in the western states, including defendant and third-party plaintiff Ernst Home Center Corporation.

7. That prior to January 3, 1981, the undersigned had traveled to Japan, and Japanese representatives from Hirota and Okada had traveled to the United States to discuss the sale and distribution of products such as the one plaintiff has alleged was involved herein.

8. That on these occasions he discussed with the Japanese representatives the fact that these products would be distributed for retail sale throughout the Western United States.

9. That it is his belief that through these conversations and various discussions that the Japanese representatives of Hirota and Okada realized and expected their products to be distributed in any state within the United States, including the State of Utah, where they could be sold on the retail market.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 17 day of January, 1986.

Cecil Mansour
CECIL MANSOUR

SUBSCRIBED AND SWORN before me this 17th day of
JANUARY, 1986.

My Commission Expires:

July 4, 1986

RGG/Parry2
jw1116

Taney Newman
NOTARY PUBLIC
Residing At: Shirman Oaks

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 23 day of Jan, 1986, to the following counsel of record:

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